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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

ROBERT J. COAR,

Petitioner,

vs.

JOSEPH KAZIMIR, ROCCO MORONGELLO, WILLIAM LEVINE, DONATO DESANTI, and ROBERT DUDIK, as Trustees of the Pension Fund Mid-Jersey Trucking Industry-Local 701, and PENSION FUND MID-JERSEY TRUCKING INDUSTRY LOCAL 701,

Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

ALAN SILBER*
MICHAEL R. PERLE
HAYDEN, PERLE & SILBER
Attorneys for Petitioner
Robert J. Coar
1500 Harbor Boulevard
Weehawken, New Jersey 07087
(201) 617-5522

**Counsel of Record*

July 7, 1993

QUESTION PRESENTED FOR REVIEW

The question presented for review is the issue reserved by the Court in Guidry v. Sheet Metal Workers Nat. Pension Fund, 493 U.S. 365, at 373 (1990), namely,

> . . . whether the remedial provisions contained in § 409(a) [29 U.S.C. § 1109(a) of the Employment Retirement Income Security Act of 1974, as amended, 29 U.S.C. §1001, et seq. ("ERISA")] supersede the bar on alienation in § 206(d)(1) [of ERISA, 29 U.S.C.§ 1056(d)(1)]. . . [?]

The decision below of the Third Circuit Court of Appeals on this question is in conflict with the decision of the Fifth Court of Appeals in Herberger v. Shanbaum, 897 F2d 801 (5th Cir. 1990), cert. denied, 111 S. Ct. 60 (1990).

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No.

ROBERT J. COAR,
Petitioner,

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JOSEPH KAZIMIR, ROCCO MORONGELLO, WILLIAM LEVINE, DONATO DeSANTI, and ROBERT DUDIK, as Trustees of the Pension Fund Mid-Jersey Trucking Industry-Local 701, and PENSION FUND MID-JERSEY TRUCKING INDUSTRY LOCAL 701,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner Robert Coar respectfully prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Third Circuit, insofar as it held, with respect to the issue specifically reserved by the Court in Guidry v. Sheet Metal Workers Nat. Pension Fund, 493 U.S. at 373, that "...the remedial provisions contained in § 409(a) [of ERISA, 29 U.S.C. § 1109(a)]..." do "...supersede the bar on alienation in § 206(d)(1)..." The decision below is in direct conflict with the decision of the Fifth Circuit in Herberger v. Shanbaum, 897 F.2d 801 (5th Cir. 1990).

OPINIONS BELOW

The opinion of the Court of Appeals for the Third Circuit, reversing the district court, is to be reported in Coar v. Kazimir, 990 F.2d 1413 (3d Cir. 1993), and is reproduced in the Appendix to this petition. (Pa 1-35)[1] The decision of the district court in favor of petitioner Coar, granting him summary judgment is reported at 792 F.Supp. 345 (D.N.J. 1992). (Pa 42-59)

JURISDICTION

The United States Court of Appeals for the Third Circuit reversed the decision of the district court on April 15, 1993, and denied petitioner Coar's timely-filed Petition for Rehearing on May 11, 1993. This Petition for a Writ of Certiorari was filed within 90 days of the aforesaid denial. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

Section 409(a) of ERISA, 29 U.S.C. §1109(a), provides in pertinent part:

> Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable to make good to such plan any losses to the plan result-

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[1] "Pa" refers to the Appendix to this Petition for Certiorari.

> breach,...and shall be subject to such other equitable or remedial relief as the court may deem appropriate[.]

Section 206(d)(1) of ERISA, 29 U.S.C. §1056(d)(1), provides that

> [e]ach pension plan shall provide that benefits provided under the plan may not be assigned or alienated.

STATEMENT OF THE CASE

Petitioner, Robert Coar ("Coar") is nearly 70 years old. His wife is in her late 50's. They support a 20 year old son who is a college student. Coar is a former trustee of the Mid Jersey Trucking Industry-Local 701 Pension Fund ("the Fund"), which is governed by the Employment Retirement Income Security Act of 1974 ("ERISA"). In 1983, Coar retired and began receiving a pension from the Fund. In 1987, Coar was convicted of conspiring to receive kickbacks in relation to his service as former trustee of the Fund, in connection with the placement of $20 million of the Fund's assets with Omni, a Florida mortgage company. See United States v. Zauber, 857 F.2d 137 (3d Cir. 1988), cert. denied, 489 U.S. 1066 (1989).

The respondents ("the Trustees") are the Fund's current Trustees. In 1984, before Coar was indicted, the Trustees filed claims against Coar, his former co-trustee, and others, under § 409(a) of ERISA, 29 U.S.C. § 1109(a) and RICO ("the civil case"). In September of 1990, a determination was made as to the ERISA and RICO liability of Coar and the others in the civil case, but no money

damages were then assessed.[2] In April, 1991, the Trustees began withholding payment of Coar's pension benefits as a set-off against a potential judgment.

In July of 1991, Coar filed an action against the Trustees in the United States District Court for the District of New Jersey, under 29 U.S.C. § 1132(a)(1), to recover the withheld benefits, and to require payment of future benefits ("the ERISA case"). In April, 1992, while Coar's suit was pending, the Fund obtained a judgment of over $25 million on the ERISA claims against Coar and others in its pending civil case. However, in May of 1992 the district court granted summary judgment in favor of Coar in the ERISA case, and in June 1992 entered judgment in his favor (Pa 60-61). The district court held, on the basis of the construction of § 206(d)(1) in Guidry, that § 409(a) of ERISA could not be read as intending to supersede the anti-alienation provision of §206(d)(1), even though court characreized the result it found the statute compelled as "unpalatable in this case...." Coar v. Kazimir, 792 F.Supp. 345, at 351 (D.N.J. 1992) (Pa 58) (emphasis added).

The Trustees appealed. On April 15, 1993, the Third Circuit issued a decision reversing the district court (Pa1-33). In a separate concurrence, Judge Becker rejected most of the majority's reasoning and basically agreed with Coar's statutory construction argument, but nonetheless concurred in the result because Judge Becker deemed the contrary result to be "counter-intuitive." (Pa 35) Coar

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[2] Prior to this time the Trustees had recovered several million dollars in settlements with various banks, brokerage houses and a major law firm.

then filed a timely Petition for Rehearing pursuant to F.R.A.P. 35 and 40, which was denied on May 11, 1993 (Pa 36)

REASONS FOR GRANTING THE PETITION

Petitioner seeks review of the decision below under Supreme Court Rule 10.1(a). The result reached by the Third Circuit is in direct conflict with the decision of the Fifth Circuit in Herberger v. Shanbaum, 897 F.2d 801 (5th Cir. 1990), cert. den., 111 S.Ct. 60 (1990), on the identical question of federal law relating to the interplay between § 206(d)(1), the anti-alienation provision of ERISA, and § 409(a), the general remedies section, the same question which the Court reserved on in Guidry.

The facts here obviously are somewhat reminiscent of Guidry, where the petitioner also was a pensioner who had been a former pension fund trustee and union official. Guidry had been convicted of actually embezzling nearly $1 million from the union. The question before the Court was the right of a union to recover a judgment in its favor by imposing a constructive trust on the pensioner's benefits from a pension fund affiliated with the union. Guidry held that ERISA pension benefits may not be subjected to a constructive trust to enforce collection of the sponsoring union's judgment. However, the Court specifically stated that:

> We need not decide whether the remedial provisions contained in § 409(a) supersede the bar on alienation in § 206(d)(1), since petitioner has not been found to have breached any fiduciary duty to the pension plans.

Id. at 373.

Prior to Guidry, in Crawford v. La Boucherie Bernard Ltd., 815 F.2d 117 (D.C. Cir. 1987), the District of Columbia Circuit had held that, notwithstanding the "anti-alienation" provision of § 206(d)(1), ERISA's legislative history supported an equitable exception to § 206(d)(1) in such situations, as reflected in the authority to award "equitable and remedial relief" for ERISA fiduciary violations granted courts under § 409(a) of ERISA, 29 U.S.C. §1109(a).

As noted, the first and previously the only circuit court decision on this question after Guidry was decided was that of the Fifth Circuit in Herberger v. Shanbaum, supra. The court there held that, notwithstanding the Court's reservation on the precise issue, Guidry's broad rejection of any equitable exceptions to the command of § 206(d)(1) had fatally undermined the reasoning of Crawford, as well as explicitly overruling several earlier cases upon which Crawford had relied. 897 F.2d at 803-804.

In the present case, the district court adopted the Fifth Circuit's analysis in Herberger. Thus, even while acknowledging that the result was "unpalatable in this case," the court held that "it is nevertheless in accordance with law, and change must come from Congress rather than from the court." Coar, 792 F.Supp. at 351 (Pa 58).

The judgment of the district court was reversed on appeal. The majority of the Third Circuit panel in the present case differed with the Fifth Circuit in Herberger, as well as the district court, and upheld the Trustees' action on the basis that the remedial provisions of § 409(a) of ERISA do create an examption in favor of a

pension fund from the bar on alienation in § 206(d)(1). Thus the Court is now squarely presented the Court with the opportunity to address this question in the context of a conflict between the two circuit courts of appeal that have dealt with this issue post-Guidry. Supreme Court Rule 10.1(a).

The equities in this case are similar to those in Guidry. However, the practical importance of this decision below resides not in its underlying facts, but rather in the impact of its doctrine. The peril implicit in the Third Circuit's decision is that this doctrine must apply in all cases in which a pension fund seeks to collect a judgment based on a fiduciary violation of ERISA against one who is also beneficiary of the fund, and allows no hedging.

Unlike the district court, which observed that the result - upholding the bar against the efforts of pension fund to collect a judgment against a fiduciary-pensioner by garnishment of his pension, while it was unpalatable in this case . . ." (Pa 58), but implied this was not necessarily so in other cases, the Third Circuit majority's view is absolutist and assumes "unpalatability" as a constant. Instead the majority conspicuously failed to address the fact that many, and probably most of the cases brought under § 409(a) do not involve fiduciary defendants who are also participants in the plan. And even in cases in which the defendant is also a plan participant, application of § 206(d)(1) does not effect the ability to collect a judgment from a defendant's non-pension assets.

Even more critically the majority particularly failed to consider that in many of the ERISA cases in which its

ruling will be applied the equities will be far different from those in Guidry or in this case. In actuality most do not involve criminal conduct or even scienter. In fact, many such cases do not even involve conduct which could be the basis of violation of fiduciary duty under common law.

Specifically, the court below never gave any weight to the fact that the threshold for a "fiduciary" violation of ERISA - giving rise to liability under § 409(a) - is not criminal conduct or even "arbitrary and unreasonable" action. Under § 404(a)(1) of ERISA, 29 U.S.C. § 1104(a)(1)(B), the standard of conduct for ERISA fiduciaries, with certain exceptions, is only that which "a reasonable man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims." Struble v. N.J. Brewery Emp. Welfare Trust Fd., 732 F.2d 325, 333 (3d Cir. 1984).

Additionally, an ERISA fiduciary has a duty to "diversify the investments of the plan so as to minimize the risk of large losses,..." under ERISA § 404(a)(1)(C), and discharge his duties "in accordance with the documents and instruments governing the plan...," under ERISA § 404(a)(1)(D).

Likewise, Section 405(a) of ERISA, 29 U.S.C. § 1105, imposes vicarious liability on a trustee for which he may he held for damages under § 409(a) if, through omission, he allows another fiduciary to breach a duty under § 404(a)(1), or has knowledge of such a breach but fails to remedy it. Thus, lay trustees can be held liable even for imprudent investment decisions made by professional asset managers they employ.

But § 409(a) does not purport to "graduate" either liability or the availability of remedies against a fiduciary based on whether a loss arises from criminal conduct, or just bad judgment. And Guidry specifically rejected the notion that liability arising from "criminal misconduct" might be a special case by itself warranting a "generalized equitable exception" to § 206(d)(1). 493 U.S. at 376.

Hence, staggering financial liability against a fiduciary can be founded under § 409(a) as readily upon a technical ERISA violation, essentially involving only a negligent act or omission, as it can be based upon a criminal violation, such as embezzlement, as in Guidry, 493 U.S. 365, or agreeing to take a kickback, as in Coar's case.[3] Thus, without a trustee or other ERISA fiduciary acting in any way that is remotely criminal or even "arbitrary and capricious," any violation of any of such duties nonetheless may subject him to immense money damages under § 409(a). Struble, at 333-334.

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[3] See, e.g., GIW Ind., Inc. v. Trevor, Stewart, Etc., Inc., 895 F.2d 729, 733 (11th Cir. 1990) (fiduciary's failure to adequately investigate market conditions and adequately diversify investments in light of fund's cash flow needs, before making investment decisions); Blackwell v. Transamerica Occidental Life, 707 F.Supp. 437, 440 (D.Nev. 1987) (applying "prudent man" standard to impose liability on fiduciary for "lack of adequate record keeping and failure to verify eligibility...," even though actions were "more closely aligned to negligence in fund management decisions..."); and Teamsters Local No. 145 v. Kuba, 631 F.Supp. 1063, 1070-71 (D.Conn. 1986) (failure to consult counsel in connection with adoption of amendment to plan).

There is also another practical dimension to the problem of the interplay between §§ 409(a) and 206(d)(1): The reality of union politics is that a "spoils system" often operates and extends to affiliated pension funds, so that most often trustees representing the employees are either the incumbent officials of the union, or chosen by them. Similarly other fiduciaries often owe their appointments to a relationship with incumbent union officials or incumbent management. Not infrequently litigation under § 409(a) is the consequence of upheavals in intra-union politics, in the wake of trustees or other fiduciaries aligned with defeated union officials being replaced by a slate named by the insurgents. Reprisal can often be the driving force behind such litigation.

Obviously, almost the only context in which the issue in the present case can arise is in a situation in which a fiduciary is also a pensioner, or eligible for a pension due to advanced age and disability. The law made by the Third Circuit majority in this case, in which it found a different result would be distasteful, is the same law that courts in the Third Circuit must apply in <u>every</u> case invoking § 409(a) to compel a breaching trustee "to make good to the plan." (Pa 29)

Given the "prudent man standard," the prospect is hardly remote that many and perhaps most of those whose pensions are placed in jeopardy by the decision below will not be "dishonest trustees, such as Coar," but instead, basically honest people, who, in their late 60's and 70's, perhaps in declining health, had the misfortune to back, or be aligned with, the wrong side in a union political dispute.

None of these considerations was addressed by the Third Circuit. The majority instead devoted itself to somewhat opaque, and inconclusive textual analysis. It ultimately was able to reach the conclusion it obviously had pre-ordained only by transposing the issue as originally stated by Guidry into a question which might be paraphrased as: Whether the bar on alienation in § 206(d)(1) supersedes the remedial provisions contained in § 409(a)? By implicitly restating the issue in this manner, the majority effectively reversed the focus of the specificity inquiry away from the language of §409(a), as posed by Guidry, and placed the burden of specificity entirely upon the language of §206(d)(1). Using this device, the majority predictably emerged with the conclusion that because § 206(d)(1) does not specifically refer to any limitation upon the use of any of the remedies available to a pension fund under § 409(a) against a breaching fiduciary, a Congressional intent could be divined to limit the applicability of the anti-alienation provision, § 206(d)(1), only to instances in which third-party creditors seek recourse to pension benefits (Pa 21).

Without citing any authority, the majority then postulated that the language of § 409(a) which provides that a breaching fiduciary "shall be liable to personally make good to the plan any such losses. . .," actually proclaims a policy "which directs the courts to ensure that the wayward trustee fulfills this obligation to make restitution through whatever remedy the court deems appropriate in the circumstances. . ." (Pa 20)

Plainly what the majority in essence held was that this language alone basically transforms the pension fund into a super-priority creditor vis-a-vis any breaching trustee-pensioner or other fiduciary-pensioner. It failed to consider that this same logic which impelled it to disregard

the anti-alienation feature of ERISA in this situation would also seem to mandate overcoming any other federally recognized defenses, immunities or exemptions a party indebted to an ERISA fund on a fiduciary claim might otherwise seek to be assert.

In addition, the majority failed to explain why it found this language in § 409(a) to be any more specific in its intention to overcome the bar of § 206(d)(1) than the language of the Labor Management Reporting and Disclosure Act ("LMRDA"), 29 U.S.C. § 501(b), which was analyzed in Guidry. LMRDA §501(b) is nearly indentical to § 409(a) in providing a right of action "to recover damages or secure an accounting or other relief for the benefit of the labor organization" - arising out of violation of § 501 of the LMRDA. In Guidry, the Court assumed, without deciding, that this language in the LMRDA "may authorize, in some circumstances, the imposition of a constructive trust," 493 U.S. at 375, the mechanism suggested by respondent in Guidry as the means by which to recoup the moneys embezzled from the union.

Moreover, neither of the opinions in the court below confronted the further observation in Guidry that had respondent's position been accepted there,

> ERISA's anti-alienation provision would be inapplicable whenever a judgment creditor relied on the remedial provisions of a federal statute. Such an approach would eviscerate the protection of §206(d) . . .

Id. Given the fact that the remedial provision of virtu-

ally every federal statute which creates civil liability contains nearly identical, or at least similar, language to that contained in § 409(a), the Court's reasoning in Guidry should command upholding the primacy of § 206(d)(1) in this case as well.

Even more recently Patterson v. Shumate, 112 S.Ct. 2242 (1992), conclusively rejected a rationale virtually identical to that embraced by the majority here in its opinion below. Specifically, the Court dismissed the argument that "the Bankruptcy Code's policy of ensuring a broad inclusion of assets in the bankruptcy estate" would be frustrated if it were held that § 206(d)(1) barred recourse to a debtor's pension rights. Patterson, 112 U.S. at 2249. Plainly the majority's rationale below was nothing more than a restatement of the same theme repudiated in Patterson.

The District of Columbia Circuit's pre-Guidry decision in Crawford was the purported authority for the Third Circuit majority finding in §409(a) a supreme and over-arching policy to achieve "restitution through whatever remedy the court deems appropriate in the circumstances. . . ." (Pa 20), based on Crawford's similar reading of §409(a) as intending to confer on courts "broad authority. . .to fashion remedies for redressing any breach. . . ." 815 F.2d at 119 (emphasis added).

It is noteworthy, however, that no decision of this this Court has given the slightest indication that § 409(a) should be viewed as anything beyond a more-or-less boiler-plate federal remedies provision. Certainly, the Court has never held § 409(a), or any similar provision to be an expression of a policy so clear that it should sweep aside the policy which Guidry found to be unambiguosly embodied in § 206(d)(1), or indeed in any

other statutory exemption.

Belying the majority's further suggestion below (Pa 18) that the Fifth Circuit misspoke in Herberger, 897 F.2d 801, when it concluded that the intent of § 206(d)(1) was "clear," (Pa 18), the Court once again was notably emphatic in Patterson, 112 S.Ct. 2242, that both the meaning and intent of § 206(d)(1) are indeed clear. Specifically, in Patterson it was held that "the clarity" of § 206(d)(1) "obviates" reference to legislative history, Id. at 2248, and may even make irrelevant "policy considerations" associated with other statutory provisions, because "the language of [§206(d)(1)] is so clear. . . ." Id. at 2249 (emphasis added). In this respect, Patterson simply echoes the conclusion of Guidry as to the clarity with which § 206(d)(1) speaks. Guidry, 493 U.S. at 375.

Moreover, unlike § 409(a) which has never been authoritatively interpreted by this Court, § 206(d)(1) has been thoroughly analyzed. In particular, this Court concluded in Guidry, 493 U.S. at 376, that Congress surely had considered that the pensioner's liability might arise from bad acts, but nonetheless enacted a statute which

> reflects a considered congressional policy choice, a decision to safeguard a stream of income for pensioners (and their dependents, who may be, and perhaps usually are, blameless), even if that decision prevents others from securing relief for the wrongs done them. If exceptions to this policy are to be made, it is for Congress to undertake that task.

This reasoning also was reaffirmed in Patterson, where it was emphasized that, in Guidry, the Court had

"vigorously. . .enforced ERISA's prohibition on. . .the alienation of pension benefits," and declined "to recognize any implied exceptions to the broad statutory bar [of § 206(d)(1)]. Id. at 2247. The Court reaffirmed in Patterson that this same policy choice must be the controlling consideration, as it had been in Guidry, "notwithstanding strong equitable considerations to the contrary ... [which would have favored the recognition of] an implied exception to ERISA's anti-alienation provisions." And Patterson, it was further stressed that the Court had never "recognize[d] any exceptions to ERISA's anti-alienation provision. . . . Id. at 2250 (citation omitted). The equities in the present case are virtually identical to those in Guidry, decided before Patterson.

As noted above, the majority subtly recast the statutory interpretation issue into a matter of negative inference, rather than plain meaning, which became the foundation for its conclusion that § 409(a) is actually more specific than § 206(d)(1); viz: "Nothing in section 206(d)(1) suggests that Congress intended that provision to limit the remedies afforded to beneficiaries under section 409(a) or in any way to protect unscrupulous fiduciaries." (Pa 19)

However, in Guidry, 493 U.S. 365, this Court held that the language of the LMRDA remedial provision involved there, providing for the availability of "other appropriate relief," could not be found controlling in the face of "an express, specific congressional directive [in § 206 (d)(1)] that pension benefits not be subject to assignment or alienation." Id. at 375. The analogous language in § 409(a), i.e., "such other equitable or remedial relief as the court may deem appropriate,"

cannot be meaningfully distinguished from the LMRDA language at issue in Guidry.

Guidry also holds out that the proper reading of § 206(d)(1), in tandem with the broad language contained in a remedies provision much the same as § 409(a), was hardly, as the majority below contended, to construe the availability of a "broad range of options" as overriding a specific exemption. To the contrary, the reading of § 206(d)(1) mandated by Guidry is that "[this section of] ERISA governs the narrow question whether [a] judgment may be collected through a particular means. . . ." 493 U.S. at 376. It is simply impossible to emerge from a fair reading of Guidry with a conclusion other than that §206(d)(1) cannot be deemed "less specific" than § 409(a).

As alternative grounds for its opinion, the majority below also suggested that to rule in the breaching fiduciary's favor would lead to an "absurd consequence." (Pa 30) However, in Guidry, this Court was candid in acknowledging a "natural distaste for the result we reach here." But the Court nevertheless held in favor of the "malefactor" based upon the clarity of the statute. Id. Fundamentally the difference in results between Guidry where the inquiry was devoted to the text of the statute, and the Third Circuit's disposition of this case, is that the court below started with its visceral reaction, and ended with its visceral reaction.

Granting that the result Coar urges is viscerally unappealing "in this case. . .," or, to use adjectives suggested or employed both by the district court below, Coar, 792 F.Supp. at 345, and this Court in Guidry, 493 U.S. at 376, "distasteful" and "unpalatable." However such a result is hardly "absurd." It is clearly not so

bizarre and egregious that it could not even have been contemplated as a possible outcome under the statute. Just as clearly it is not an outcome unequivocally at war with the congressional policy of the statutory provision which gave it birth. Quite to the contrary, it is precisely the type of troubling outcome that Guidry found Congress had considered and accepted as a possibility, involving a legislative trade-off, based on a judgment that is was worth the price of enduring such outcomes on occasion in order to achieve other objectives of the ERISA statutory scheme. In speaking to this issue, the Court emphasized Guidry, that in every instance in which § 206(d)(1) or the like is invoked by a debtor,

> [s]uch a provision acts, by definition, to hinder the collection of a lawful debt. A restriction on garnishment therefore can be defended only on the basis that the effectuation of certain broad social policies sometimes takes precedence over the desire to do equity between particular parties. It makes little sense to adopt such a policy and then to refuse enforcement whenever enforcement appears inequitable. A court attempting to carve out an exception that would not swallow the rule would be forced to determine whether application of the rule in particular circumstances would be 'especially' inequitable. The impracticality of defining such a standard reinforces our conclusion that the identification of any such exception should be left to Congress.

493 U.S. at 376-377.

The result sought by Coar, though it may provoke "a natural distaste," Id. at 377, is hardly at odds with the policy embodied in § 206(d)(1). Instead, while such a result bespeaks the difficulty of the "considered policy choice" Congress made, the essence of that choice was an acceptance of the possibility that in some cases it might serve to shield someone from paying for his "criminal misconduct," and could "prevent others from securing relief for wrongs done them." Without this recognition no choice woud have been involved. Accordingly the outcome petitioner urges is perfectly in harmony with the overriding policy consideration, and a faithful relection of Congress's choice in enacting § 206(d)(1), ". . .to safeguard a stream of income for pensioners (and their dependents. . .), even if that decision prevents others from securing relief for the wrongs done them." Id. at 376. That at times this choice may operate at cross-purposes with, or frustrate another general objective served by, another provision of ERISA, or another federal remedial provision - i.e., to effectuate whatever rights to a remedy such a provision generally alludes to - is legally irrelevant. Congress obviously considered this in enacting § 206(d)(1) and decided to protect equally, and without distinction, the pensions of scoundrels, and the honest, but woebegone.

Tellingly, even the decision of the majority below implied some acknowledgement that the doctrine it adopted would not produce in every case a result which clearly would best serve the general design of ERISA. The most it offers is that

> [to permit] a set-off in this case best implements Congress's purpose to guarantee beneficiaries the broadest protection possi-

> ble against fiduciaries who breach their fiduciary duties to a pension fund and thereby cause it losses.

(Pa31) (Emphasis added.)[4]

Although the majority decision below must be read as a straight-out answer to the question posed but unanswered in Guidry, it is clear from the opinion itself that its formulation was entirely driven by ad hoc considerations, namely reluctance to allow "an individual such as Coar to collect pension benefits prior to satisfying his liabilities to the fund." (Pa 29) This creates an inherent tension in the decision between the statement of doctrine and its implications, reflected most clearly in n. 13 of the court's opinion:

> We recognize that it is possible that a pension fund might in circumstances which are arguably premature set off benefits such as when it claims nothing more than that a trustee made an unwise investment and the trustee disputes that claim.

(Pa 31, n. 13) (emphasis added.)

The characterization in the footnote of the

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[4]In contrast, the district court recognized that although "in this case" upholding the primacy of § 206(d)(1) would produce a difficult result, the overriding policy considerations had to remain the same in all cases and demanded uniform application of anti-alienation statute (Pa 58).

"problem" being that allowing a set-off in these circumstances might be "premature" is plainly a disingenuous attempt to deflect attention from the fact the court on some level was recognizing that it had made a choice, one which might imply or portended a series of harsh and "unpalatable" outcomes in other cases, in spite of the visceral satisfaction that choice afforded here. Obviously the real disquieting element in the "unwise investment" scenario, is that, unlike Coar's case, it might be far less "equitable," even "unpalatable" in some instances, to allow a fund to set- off an ERISA fiduciary liability against benefits. Whether or not it would be premature is totally beside the point. Delaying the pension fund's ability to begin making a set-off, i.e., until there is an actual money judgment mitigates the impact only for as long as it takes to get a judgment. The final result is the same - a lost pension.

One must therefore detect in this footnote an acknowledgement by the majority below that, although it portrayed its decision as a textually-compelled, straight-out answer to the question posed but unanswered in Guidry, it was actually driven to reject the result reached by the district court almost entirely by the disturbing specter of allowing "an individual such as Coar to collect pension benefits . . . ." (Pa 29), rather than any firm conviction regarding the interplay of the language between § 409(a) and § 206(d)(1).

On the other hand, Judge Becker in his concurring opinion was not burdened by any apparent need to disguise his reasoning. He dismissed the majority's textual analysis as nothing more than window-dressing to support a result based entirely upon a distaste for the outcome a fair reading of statutory provision compelled, and conceded that the petitioner's reading of the statutes was essen-

tially correct. His opinion is noteworthy for his candor in stating essentially that the only reason he was concurring in the result was that he too found the contrary outcome unpalatable, and the issue had yet to be resolved by this Court (Pa 34).

Plainly all members of the court below failed to heed the admonitions of this Court in Guidry, and fell prey to "the desire to do equity between particular parties. . ." and the temptation to "refuse enforcement [of a clear Congressional policy whenever] enforcement appears inequitable." All succumbed to the temptation "to carve out an exception," based upon "particular circumstances [in which it seems enforcement of the rule of the statute]. . .would be "especially" inequitable." The resulting exception not only "swallows the rule," it also itself promises a host of "unpalatable results" in future cases where equities may be startlingly different or even reversed. Id. at 376-377. As Guidry counselled, "[t]he impracticality of defining such a standard reinforces our conclusion that the identification of any such exception should be left to Congress." Id. at 377.

CONCLUSION

For all of the foregoing reasons, under Rule 10.1(a) the Petition for a Writ of Certiorari should be granted to resolve the conflict between the Third Circuit and District of Columbia Circuit on the one hand and the Fifth Circuit on the other as to the important question under ERISA left open by this Court in Guidry, 493 U.S. at 373, as to whether the remedial provisions of § 409(a) of ERISA do supersede, or create an exception to the "anti-alienation" policy of ERISA, embodied in § 206(d)(1).

Respectfully submitted,
/s/Alan Silber
ALAN SILBER
Counsel of Record
HAYDEN, PERLE & SILBER
Attorneys for Petitioner
1500 Harbor Boulevard
Weehawken, NJ 07087
(201) 617-5522

Michael R. Perle
Of Counsel

Weehawken, New Jersey
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